

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals
for the District of Columbia

OCTOBER TERM — 1947

*United States Court of Appeals
for the District of Columbia*

Appeal No. 9573

FILED NOV 10 1947

WARREN F. BAUGH, *Appellant,*

Joseph W. Stewart
CLERK

v.

MARK MECKLER, ET AL., *Appellees.*

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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WARREN F. BAUGH, *Appellant*,

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APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

I. JURISDICTIONAL STATEMENT

This is an appeal by Warren F. Baugh, appellant, from a judgment of the Municipal Court of Appeals for the District of Columbia reversing a judgment of the Municipal Court, Civil Division. The Municipal Court gave judgment in favor of appellant, plaintiff below. An appeal was taken to the Municipal Court of Appeals, which reversed the judgment on June 12, 1947. The appellant petitioned this Court

for an allowance of an appeal, and this Court allowed an appeal on September 24, 1947.

The Municipal Court had jurisdiction inasmuch as the amount in controversy was \$500.00. The Municipal Court of Appeals had jurisdiction to review and reverse the judgment by virtue of Sec. 11-772, District of Columbia Code (1940) Supp. III. This Court has jurisdiction to entertain this appeal by virtue of Sec. 11-773, District of Columbia Code (1940) Supp. III.

II. STATEMENT OF THE CASE

On August 30, 1946, appellant, a negro, entered into a written contract with the appellee, Mark Meckler, a white person, and the latter's real estate agent, the appellee R. G. Dunne, for the purchase by appellant and the sale by the appellees of Lot 212 in Square 1054 in the District of Columbia and otherwise known as premises, 1426 C Street, N. E., for a price of \$13,250.00 and appellant paid a deposit of \$500.00 to the appellees and the parties agreed to perform in accordance with the terms and provisions of the contract within 30 days. (App. 11). Attached to said contract, and expressly made a part thereof, was a copy of a restrictive race covenant of record, said covenant providing that said real estate should not be used, occupied by, sold, conveyed, leased or rented to any negro or person of the negro race or blood, said covenant to be binding on the parties thereto, their respective heirs and assigns. (App. 12). Appellee Meckler was a party to said covenant as an assignee and appellant, Baugh, is a member of the restricted class of persons. Also attached to said contract was a letter from appellee, Meckler, addressed to appellee, Dunne, authorizing appellant, Baugh, to move into possession of said property before settlement upon depositing an additional \$3,500.00 in escrow with the Title Company, and also upon the further condition that appellant sign the following

statement contemporaneously with the execution of said contract:

"I, Warren F. Baugh, in moving into the premises, 1426 C Street, N.E., hereby certify that I have full knowledge of the *existing covenant now in effect covering said 1426 C Street, N. E., and assume full liability in moving in said premises.*" (App. 14). (Italics supplied).

On September 11, 1946, while the contract was still executory, the appellant repudiated it and so notified the appellees and demanded a return of his deposit. (App. 14). The appellees declared appellant's deposit forfeited and refused to return the same. (App. 16).

The trial court gave judgment for appellant. (App. ³17). On appeal to the Municipal Court of Appeals the judgment was reversed, (App. 22), and the case is now before this Court on an appeal from the Municipal Court of Appeals.

III. STATEMENT OF POINTS

1. The contract of sale was void ab initio because it was against local public policy concerning restrictive race covenants on real estate in the District of Columbia.
2. The contract of sale was void ab initio because it was against public policy, in that its performance requires the breach of a prior inconsistent contract between one of the contracting parties and third persons.
3. The contract of sale was void ab initio because it lacks mutuality.

IV. QUESTIONS PRESENTED

The questions presented for adjudication in the trial court; reviewed and reversed by the lower appellate court, and now before this Court are: (1) whether the contract of sale was void ab initio or whether it is valid? and inferen-

tially, (2) if the contract is valid because the restrictive covenant had become unenforceable because of a change in the neighborhood, at what factual point between cases like *Corrigan v. Buckley*, 55 App. D. C. 30, on the one hand and *Hundley v. Guerwitz*, 77 U. S. App. D. C. 48, on the other, does a contract of sale like the one here involved become valid? and (3) in a proceeding wherein the defense relied upon is: that a particular restrictive race covenant is unenforceable because of a change in neighborhood or because of abandonment, what is the minimum proof required to establish said defense?

V. SUMMARY OF ARGUMENT

The appellant contends the contract of sale was void ab initio because of the following reasons:

- (1) Rights created by covenants such as the one here involved, have been so consistently enforced by this Court as to become a rule of property and within the accepted public policy of the District of Columbia. Since such covenants come within the protection of local public policy, a contract, the performance of which requires the breach of such covenant, is against that public policy and void. Appellant admits that cases coming within the rule in *Hundley v. Guerwitz*, *supra*, are exceptions to the foregoing rule, but appellant contends that the established facts in this case do not bring it within the rule in the *Hundley Case*.
- (2) A contract which has for an integral part of its consideration the breach of a prior inconsistent contract between one of the contracting parties and a third person is void and unenforceable as being against public policy.

The appellee Meckler, as assignee, was a party to

said covenant; the covenant contract was executed prior to, and was inconsistent with, the contract of sale and performance of said contract of sale required appellee, Meckler, to breach his contract of covenant. Therefore, the contract of sale comes squarely within the foregoing rule and is void as being against public policy.

- (3) One of the cardinal tests of the presence or absence of mutuality in a contract is whether the agreement is enforceable against each of the parties by the other. If an action for specific performance of the agreement, or to recover damages for its breach, cannot be maintained, the contract lacks mutuality and is void.

The contract in this case lacks mutuality, because neither of the contracting parties could have maintained an action for specific performance of the agreement, or one to recover damages for its breach.

VI. ARGUMENT

The undisputed and conceded facts surrounding the execution of the contract of sale are: That the real estate in question was encumbered with a restrictive race covenant running with the land prohibiting the sale and transfer of said property to a person of the negro race or blood; that said covenant was binding on the parties thereto, their heirs and assigns; that the seller (Meckler) is a white person and a party to said covenant as an assignee, and the purchaser (Baugh) is a negro and within the restricted class of persons; that both said seller and purchaser had actual knowledge of the existence of said covenant before the contract was signed by either party and a copy of said covenant was attached to said contract and expressly made a part thereof; that also attached to said contract of sale was a statement prepared by the seller which he had the

purchaser to sign contemporaneously with the execution of said contract, whereby said purchaser assumed full liability in moving into said premises; that both parties knowingly and wilfully entered into an agreement, the performance of which would violate the sanctity of said covenant contract, and said parties knew that said contract of sale obligated the seller (Meckler) to a performance inconsistent with, and antagonistic to, his duties and obligations owed to the parties to said covenant.

The appellant contends that a contract based upon the foregoing facts is illegal and void (1) as against public policy; and, (2) lack of mutuality.

A. The Contract Was Void Ab Initio

(1) Local Public Policy with Respect to Restrictive Race Covenants on Real Estate.

The public policy of a state of which the Court will take notice and to which they give effect is determined from its constitution, laws and judicial decisions.

Mays v. Burgess, 79 U. S. App. D. C. 343, 147 F. (2d) 869.

Picket Pub. Co. v. Board of Commissioners, 92 P. 524, 36 Mont. 188.

There is no legislation by Congress as to what the public policy is in the District of Columbia with respect to restrictive race covenants on local real estate. Therefore, to ascertain what that public policy is we must refer to the decisions of the Courts.

Beginning with the first reported case on the subject in this jurisdiction, as long ago as 1924, of *Corrigan v. Buckley*, 55 App. D. C. 30, 299 Fed. 891, down to the present time, a period of 26 years, there have been numerous cases filed in our District Court testing the validity and enforceability of restrictive race covenants on local real estate. In nearly

all of these cases two defenses, among others, were interposed: (1) change of neighborhood; and (2) that the covenants were void as being against public policy.

A majority of these cases went on appeal from the District Court to the Court of Appeals, where this Court gave judicial pronouncement as to what the public policy is in the District of Columbia in regard to restrictive race covenants on local real estate. In a long line of decisions from *Corrigan v. Buckley*, *supra*, to *Mays v. Burgess, et al.*, 79 U. S. App. D. C. 343, 147 F. (2d) 869, (1945), leading up to the public policy pronouncement, this Court has consistently held, without exception, that restrictive race covenants on local real estate are—

- a. valid;
- b. not against public policy;

and, with only two exceptions, to wit: *Hundley v. Guerwitz*, 77 U. S. App. D. C. 48, 132 F. (2d) 23, and *Gospel Spreading Assoc., Inc., v. Bennett, et al.*, 79 U. S. App. D. C. 352, 147 F. (2d) 878, that such covenants are enforceable, not only as against negroes but also as between the parties to the covenants themselves.

Corrigan v. Buckley, supra.

Torrey v. Wolfes, 56 App. D. C. 4, 6 F. (2d) 702.

Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981.

In support of this unbroken line of judicial decisions by the District and Appellate Courts in favor of the validity of such covenants, this Court in *Mays v. Burgess, et al.*, 79 U. S. App. D. C. 343, 147 F. (2d) 869, in ruling against the defense that the covenant was against public policy, said:

“As stated before, rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia.

“Little need now be said on the subject of that policy.

The proposition is not new and was unsuccessfully urged in the *Corrigan case, supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which private action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced—in the main—from these sources. Surely it may not—properly—be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other.”

This Court having judicially determined that rights created by restrictive race covenants, such as the one here involved, have been so consistently enforced as to become a rule of property and within the accepted public policy of the District of Columbia, it is submitted that a contract, the purpose and performance of which is designed to violate such a covenant, is against that expressed public policy and is therefore illegal and void.

Mays v. Burgess, et al., supra.

Willey v. Collier, 7 Md. 272, 61 Am. Dec. 346.

(2) *General Public Policy with Respect to the Breach of a Prior Inconsistent Contract Between One of the Contracting Parties and a Third Person.*

A contract which has for an integral part of its consideration the breach of a prior inconsistent contract between one

of the contracting parties and a stranger, is based on an illegal consideration, and is void and unenforceable by either party thereto.

Reiner v. N. A. Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561.

Roberts v. Criss, 266 F. 296, 11 A. L. R. 698.

Rhoades v. Malta Vita Food Co., 112 N. W. 940.

In *Reiner v. N. A. Newspaper Alliance*, 259 N. Y. 250, 181 N. E. 561, plaintiff sued to recover damages for breach of contract whereby plaintiff, as a passenger on the Graf Zeppelin on its flight from Germany to the United States, was to furnish defendant with news dispatches of said flight. Prior to making this contract plaintiff knew that the exclusive news rights of the flight of the dirible had been acquired by a third party and plaintiff had agreed, as a condition of being given passage, that he would give no interviews and send no reports of said passage while en route and for eight days after the completion of the flight. It was held that the contract in suit violated a prior contract with a third party and was unenforceable and void.

In *Roberts v. Criss*, 266 F. 296, 11 A. L. R. 698, action was brought on a contract made between a member of the Stock Exchange and another, under which such member was to use his membership in violation of the rules of the Exchange. In dismissing the complaint the court said: "A contract, the basis of which is the violation by one of the parties of the contract with a third party, will not be enforced by a court as between the parties."

Rhodes v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940, was a suit to recover salary. The Company made a secret agreement with an employee of a rival company whereby the employee was to abandon his contract of employment, the object being to embarrass the rival company as a competitor. It was held the transaction was illegal and fraudulent and did not

furnish a good consideration for the promise to pay the salary.

In Wald's Pollock on Contracts (3 Am. Ed.) 376, it is said:

"An agreement will generally be illegal, though the matter of it may not be an indictable offense, and though the information of it may not amount to the offense of conspiracy, if it contemplates any civil injury to third persons. Thus an agreement to carry out some object in itself not unlawful * * * by means of a breach of contract or breach of trust is unlawful and void."

Any contract, the object or necessary tendency of which is to place one owing duties to third persons in a position where he is under obligations to parties having antagonistic interests, is void, although in fact it has no bad effect.

Bolton v. Amsler, 95 N. Y. S. 481.

Weegham v. Killifer, 215 F. 289.

In the case at bar the appellee, Meckler, as an assignee under the covenant, had contracted with the other parties to the covenant that said Lot 212 in Square 1054 should not be sold to a negro or person of the negro race or blood, therefore when said appellee entered into the contract to sell said property to the appellant, who is a negro, the object or necessary tendency of said contract was to place said appellee, who owed duties under said covenant to the other parties thereto, under obligation to the appellant whose interests in the subject matter of the contract were antagonistic to those of the parties to said covenant. Since the performance of appellee's contract with appellant required the breach of appellee's contract with his covenantees the contract with appellant was void.

Reiner v. N. A. Newspaper Alliance, *supra*.

Appellees contended below that the object of the contract

was not illegal; that its purpose was to sell appellant a house, and that such a purpose is not illegal.

A contract may be illegal and void, even though its object may not be unlawful or involve moral turpitude, if its performance contemplates any civil injury to third persons or results in a breach of contract with third persons.

Wald's Pollock on Contracts (3 Am. Ed.) 376.
Reiner v. N. A. Newspaper Alliance, 181 N. E. 561.

e.g. An agreement for the employment of one's personal services in a lawful business is not per se illegal, yet if performance of such a contract requires the breach of a prior contract with a third party such contract is illegal and void;

Weegham v. Killifer, 215 F. 289.
Rhoades v. Malto Vita Pure Food Co., 112 N. W. 940,
 149 Mich. 235.

nor is an agreement, the object of which is to erect an apartment house, illegal in and of itself, but such an agreement is illegal and void if the agreement requires the erection of the apartment house in a restricted area.

Menzel v. Niles Co., 86 Col. 320, 281 P. 364.

Appellees further say, it was not shown that the seller himself, or any of the other present owners of the property in the block, themselves signed or executed the covenant and at best it can be said that it was a covenant running with the land binding the property, and was not personal with the parties who actually executed it.

A certified copy of the original covenant and signatures thereto was in evidence and is part of the record on appeal. It is elementary that a covenant running with the land is binding on the parties thereto, their heirs and assigns. Further, the point was raised and considered in *Mays v. Burgess, et al.*, 79 U. S. App. D. C., and expressly decided contrary to appellees' contention.

(3) *The Contract of Sale Was Void Ab Initio Because It Lacks Mutuality.*

One of the tests of the presence or absence of mutuality in a contract is whether the agreement is enforceable against either of the parties by the other.

Volger v. Pekoe, 157 Ill. 339, 42 N. E. 386.

If an action for specific performance of the agreement, or to recover damages for its breach, cannot be maintained, the contract lacks mutuality and is void.

Reiner v. N. A. Newspaper Alliance, *supra*.

Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347.

Rhoades v. Malta Vita Pure Food Co., 112 N. W. 940.

The contract in this case lacks mutuality, because neither of the contracting parties could maintain an action for specific performance of the agreement, or one to recover damages for its breach.

The act of appellee Meckler in preparing a statement (wherein the choice of the language used was his own) which he attached to the contract of sale and which he required appellant to sign contemporaneously with the execution of the contract, whereby said appellee, by the choice of the language used, acknowledged that said covenant was "now in effect covering said 1426 C Street, N.E." and had appellant "assume full liability in moving in said premises," was a part of the *res gestae* and constituted a part of the transaction, and as such fully explains the state of appellee's mind that at that time appellee believed said covenant was in full force and effect and subject to successful enforcement by other parties to the covenant.

Lee v. Mitcham, _____ App. D. C. _____, 98 F. (2d) 298,
117 A. L. R. 1427.

Mutual Life Ins. Co. v. Hamilton, 145 U. S. 285, 36
L. Ed. 707.

B. The Contract of Sale Is a Nullity Irrespective of the Enforceability of the Covenant

There is another reason of substance which makes said contract void. Assuming, without conceding, that said covenant was unenforceable either because of a change in the neighborhood or because of abandonment as appellees contend, the contract of sale with said covenant expressly made a part thereof was still a nullity.

The contract was to be performed as a whole; it was entire and not severable; if it is valid at all then it must be valid in toto and as to all its terms and provisions.

Loveland v. Aymett's Auto Arcade, 121 Conn. 231,
184 A. 376.

Broxton v. Nelson, 103 Ga. 327, 30 S. E. 38.

*Continental Wall Paper Co. v. Lewis Voight & Sons
Co.*, 148 F. 939, 19 L. R. A. (NS) 143.

By the terms and provisions of said contract the appellee Meckler was obligated to convey said property to appellant, Baugh, and also under the terms and provisions of said agreement, as a result of said covenant having been expressly made a part thereof, said appellee was obligated not to convey said property to said appellant. If the contract was valid then said appellee was obligated to do and also obligated not to do the one act which is the essence of the contract—convey the property to the purchaser. Obviously these two provisions, inconsistent with each other, clash head-on. It is impossible for said appellee to perform both of them; yet each is as obligatory as the other upon said appellee.

This impossibility of performance appeared on the face of the contract and was known to both parties at the time the agreement was made.

Ordinarily, where a promise cannot be performed and the impossibility is known to both of the parties at the time of making the agreement, there can be no intention of performing it on the one side and no expectation of its being performed on the other, and therefore one of the essentials of a valid promise—namely, a sufficient consideration—is wanting.

Runyon v. Culver, 168 Ky. 45, 181 S. W. 640.

If an obvious physical or legal impossibility of performance appears on its face, the contract is void.

Jacksonville, M. P. R. & Navy Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

If a person contracts to do what at the time is absolutely impossible, the contract will not bind him because no man can be obliged to perform an impossibility.

Jones v. United States, 96 U. S. 24, 24 L. Ed. 644.

Thus the picture is crystal clear that the contract lacks mutuality which creates a want of consideration and is therefore void.

C. Appellant's Right to Maintain This Suit

Finally, appellees say, that if the contract is illegal as appellant contends it is, then he cannot maintain this suit because appellant is in *pari delicto* with the appellees and the court will not aid either party to the contract but leave them like it finds them.

The foregoing position of appellees would be an effective answer to appellant's claim if the suit were one based upon the contract, either to enforce its provisions or to recover damages for its breach. But the very essence of appellant's suit is the fact that he was in *pari delicto* with appellees

to an illegal contract which he repudiated and disaffirmed while said contract was still executory. The law which supports appellant's right to maintain this suit and recover back his deposit is stated in 12 Am. Jur., 732, para. 216:

"The courts allow a party who, though he is in *pari delicto*, repudiates the agreement while it is executory to recover whatever he had given thereunder, the recovery being not under the agreement, but in disaffirmance of it, on a promise implied or a right existing independently thereof. Accordingly, it has been held in many cases that where the matters called for in the agreement that render it illegal do not involve moral turpitude, but are merely *mala prohibita*, either party, while the contract remains executory, may disaffirm it on account of its illegality and recover back money or property that he has advanced under it."

Bernard v. Taylor, 31 P. 968, 23 Ore. 416

Pullman Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 43 L. Ed. 108.

Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347.

D. Theory of Appellees' Defense

The appellees contend that the contract of sale is valid because (1) the rule in *Hundley v. Guerwitz*, 77 U. S. App. D. C. 48, 132 F. (2d) 23, and *Gospel Spreading Assoc. v. Bennett*, 79 U. S. App. D. C. 352, 147 F. (2d) 878, controls the case; and (2) the covenant had been abandoned.

(1) *Change of Neighborhood*

The only evidence in support of appellees' claim that the neighborhood had changed is: That of the 26 houses burdened with said covenant, 18 of them had been sold to colored people and the owners of the other 8 covenant burdened houses were willing to sell to colored persons, and also the admission, on cross examination, by the appellant that no one had brought a suit, or threatened to bring a

suit, against him to enforce the covenant. There is no evidence of the size of the neighborhood area; of the total number of homes in the area; of the character of occupancy as to race in the entire neighborhood; as to racial occupancy of other streets in the immediate neighborhood area; of schools and churches, if any, in the area and whether the attendants were white or colored. Evidence on these questions is vital in determining whether or not there has been a racial residential change in a particular neighborhood. A mere penetration of negro residents into a white residential neighborhood does not, per se, necessarily effect a change of the residential character of the neighborhood as recognized by this Court.

Grady v. Garland, et al., 67 App. D. C. 72, 89 F.(2d) 817.

Mays v. Burgess, 79 U. S. App. D. C. 343, 147 F. (2d) 869.

Hurd v. Hodge, U. S. App. D. C. ..., F. (2d) ..., 75 W. L. R. 953.

(2) *Abandonment*

The evidence adduced on behalf of appellees was wholly insufficient to support the conclusion that the enforcement of the covenant had been abandoned by all parties who were entitled to rely upon its benefits.

There was no testimony from any covenantee who had not breached the covenant; only the appellee who relies on his own breach, with that of some others, to show an abandonment. One should not profit by his own wrong.

Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051.

There was no evidence as to when negro occupancy began; such evidence is material on the question of laches.

The admission by appellant that he had not been threatened with a suit to enforce the covenant, had no probative value whatever. There was no evidence that any party en-

titled to the protection of the covenant had notice that appellant had contracted to purchase said property, therefore none of such persons were estopped, because of laches, from bringing suit to enforce said covenant after appellant took possession.

Each of the parties to a covenant has vested rights which may not be defeated by adverse action by other parties to the covenant. The mere fact that some of the parties to a covenant have breached its terms is not binding on the others who insist on the strict observance of the covenant.

Voorheis v. Powell, 261 Mich. 378, 246 N. W. 154.

The opinion of some of the lot owners in a restricted area that the restriction is no longer beneficial, does not deprive another lot owner of the right to rely upon the covenant.

Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043.

Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765.

and it has been held that the covenantee may, although he has parted with all property in the neighborhood, enforce a restrictive covenant on the use of such property against an assignee of his grantee with notice.

Van Sant v. Rose, 260 Ill. 401, 103 N. E. 194.

When appellees insist that appellant could have had specific performance of the contract or damages for its breach, they immediately find themselves on the horns of a dilemma. On the one hand they are forced to, and do, admit that these restrictive race covenants are valid and enforceable, not only as against negroes, but as between the parties themselves, and within the protection of the public policy of the District of Columbia; and on the other hand they say, if a party to a restrictive covenant should contract to breach that covenant by selling the property to a negro, and then subsequently changes his mind and refuses to carry out the

agreement the courts, at the instance of the other party to the contract, will compel the seller to violate the covenant by conveying the property to the negro purchaser, or give the latter damages in lieu thereof. In other words they say: Such covenants are valid and binding on the parties to them, but if one of the covenanting parties attempts to violate the covenant and then refuses to do so, the court will either compel him to violate the covenant or award damages against him for keeping the covenant inviolate.

CONCLUSION

It is respectfully submitted that the judgment of the Municipal Court of Appeals is error and should be reversed and that the judgment of the trial court should be affirmed.

Respectfully submitted,

PHILIP W. THOMAS,
THOMAS W. PARKS,
Attorneys for Appellant,
207 Florida Avenue, N.W.
Washington 1, D. C.

APPENDIX

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IN THE
**United States Court of Appeals
for the District of Columbia**

Appeal No. 9573

WARREN F. BAUGH, *Appellant,*

v.

MARK MECKLER, ET AL., *Appellees.*

**APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

JOINT APPENDIX

• • • • •

Filed October 21, 1946, Mun. Ct. D. C.

COMPLAINT

The plaintiff, Warren F. Baugh, sues the defendants, Mark Meckler and R. G. Dunne, for that heretofore, to wit:

On August 30, 1946, the defendant, R. G. Dunne, a real estate agent for the defendant, Mark Meckler, procured and induced said plaintiff to enter into a written agreement with the defendant, Meckler, whereby the plaintiff agreed to buy and the defendant, Meckler, agreed to sell and convey to the plaintiff, Lot 212 in Square 1054, with improvements thereon, known as premises, 1426 C Street, N. E., in the District of Columbia; said sales agreement further pro-

vided that plaintiff make a deposit of \$500.00 which was to be held by defendant, Dunne, until settlement, which said settlement should be made in 30 days, and plaintiff paid said \$500.00 as thus required.

That on March 27, 1945, certain persons, including the defendant, Meckler's predecessor in title, owners of properties on said C Street, N. E., between 14th and 15th Streets, entered into a certain written restrictive covenant wherein and whereby the parties thereto agreed, promised and covenanted, each with the other, for themselves and for their respective heirs and assigns that no part of the land then owned by the parties thereto "shall ever be used or occupied, or sold, conveyed, leased, rented or given to Negroes or any person of persons of the Negro race or blood"; that this covenant was made to run with the land and to bind the respective parties thereto, their heirs and assigns, for a period of five (5) years from the date thereof; that at the time of entering said sales agreement said covenant was in full force and effect and a copy of said covenant was attached to said sales agreement and expressly made part thereof; that the plaintiff is of the negro race or blood and within the class of persons to whom said defendant, Meckler, through his predecessor in title, contracted not to sell or convey said real estate.

The plaintiff avers that said sales agreement to sell, buy and convey said real estate is void, because (a) said contract requires the doing of an act which is against public policy; (b) said contract is based upon an illegal consideration, in that an integral part of its consideration is the breach of a prior inconsistent contract between the defendant, Meckler and the parties to said covenant contract; and, (c) said sales agreement lacks mutuality which creates a want of consideration.

That on September 11, 1946, said plaintiff advised each of said defendants that he repudiated said sales agreement and demanded the return of the deposit of \$500.00, but notwithstanding said repudiation and demand said defendants,

and each of them, have failed and refused to return said \$500.00 or any part thereof.

WHEREFORE, the premises considered, the plaintiff demands judgment against the defendants, jointly and severally, for \$500.00, plus costs of this suit.

(s) WARREN F. BAUGH

BILL OF PARTICULARS

Due from the defendants, R. G. Dunne and Mark Meckler, to the plaintiff, Warren F. Baugh, money advanced by the plaintiff to the defendants for the use and benefit of said defendants in the sum of \$500.00.

(s) WARREN F. BAUGH

(s) PHILIP W. THOMAS

PHILIP W. THOMAS & THOMAS W. PARKS

Attorneys for Plaintiff

207 Florida Avenue, N. W.,

Washington, D. C.

SESSION RESUMED

Monday, January 13, 1947

JUDGE SCOTT

Mins. 140,

Page 276:

Finding for plaintiff in sum of five hundred dollars (\$500.00).

SESSION RESUMED

Tuesday, February 11, 1947

JUDGE SCOTT

Mins. 140,

Page 279:

Defendants' motion for new trial, filed herein, is hereby

overruled and judgment entered on finding herein. Wherefore, it is considered that plaintiff recover of defendants in the sum of five hundred dollars (\$500.00) interest from date and costs.

* * * * *

NOTICE OF APPEAL

Notice is hereby given that Mark Meckler and R. G. Dunne appeal to The Municipal Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of February, 1947.

(s) HERMAN MILLER,
Attorney for Defendants
 800 H Street N. W.

Names and addresses of parties
 or attorneys to be served:

PHILIP W. THOMAS, Esq.,
Attorney for Plaintiff
 207 Florida Avenue, N. W.

Filed February 28, 1947, Mun. Ct., D. C.

STATEMENT OF ERRORS CLAIMED

The defendants claim the following errors in the trial of the above case:

1. The Court erred in making a finding and entering a judgment thereon in favor of the plaintiff under all of the evidence in this case.

2. The Court erred, in absence of fraud or misrepresentation, that the contract entered into between the parties was void or illegal.

3. The Court erred, in absence of fraud or misrepresentation, that the contract entered into between the parties was against public policy.

4. The Court erred in not holding that the contract between the parties with knowledge of all of the facts by the purchaser, was breached by the plaintiff, and therefore he was not entitled to recover.

(s) HERMAN MILLER,
Attorney for Defendants
 800 H Street N.W.

I hereby certify that I mailed a copy of the above statement to Philip W. Thomas, Esq., attorney for plaintiff, 207 Florida Avenue N.W., by U. S. Mail, postage prepaid, this 27th day of February, 1947.

(s) HERMAN MILLER.

* * * * *

STATEMENT OF EVIDENCE AND PROCEEDINGS

The above case came on for trial before Judge Scott, sitting without a jury, and to sustain the issues joined, the plaintiff, Warren F. Baugh, testified substantially as follows:

That he was the plaintiff, and that prior to August 30th, 1946, he observed an advertisement in the newspaper, advertising premises 1426 C Street N. E., as being vacant and open for inspection; that he, unaccompanied, went to inspect said premises and found a salesman on the premises; that he discussed buying the property with the salesman; that nothing was said at that time about a restrictive race covenant being on the property; that the next day he signed a written offer to purchase the property and placed a deposit of \$500.00 with the offer; that the said written offer did not contain any reference to the covenant and nothing was said at that time concerning it; that one or two days later the agent came back and brought another

written offer to purchase said property, which said written offer had a recital typed on the reverse side thereof that the buyer had full knowledge of the covenant on record against the property; that a copy of said covenant was attached to said offer as a part of said contract; also attached to said offer was a letter addressed to the real estate agent and signed by the seller stating conditions upon which the buyer might move into possession before settlement, and also a statement for the buyer to sign acknowledging the existence of the covenant and the buyer assuming "full liability" in moving into said premises; that the agent at that time told him he had brought this offer for him to sign because the first one did not mention about the covenant; that the seller wanted him to know about the covenant and had attached a copy to said offer; that the same was to be initialed by the buyer and he also was to sign the statement assuming full liability for the covenant; that the agent told him that the covenant would not be enforced, because other white people in the block were going to sell their property to colored people; that he (the buyer) then signed the offer to buy and he initialed the copy of the covenant attached thereto and he also signed the attached statement assuming full liability for the covenant. (The signed contract, with copy of covenant attached, with buyer's initials thereon and copy of statement assuming full liability signed by buyer, were admitted into evidence—See plaintiff's exhibit marked 1). Plaintiff further testified on direct examination—That he began to worry about the covenant and he went to see his lawyer; that he asked his lawyer if he could get his deposit back because he did not want the property with a covenant on it; he was advised he could rescind the contract, notify the seller and agent that he rescinded the contract and get his money back; that he did notify the defendants that he rescinded the contract and demanded a return of his deposit of \$500.00 (notice to defendants rescinding the contract was admitted into evidence—see plaintiff's exhibit 2 and 3); that defendant seller re-

fused to refund the deposit and notified plaintiff that his money was declared forfeited. (See plaintiff's exhibit 4), certified copy of restrictive covenant admitted into evidence. (See plaintiff's exhibit 5).

On cross-examination the plaintiff admitted he made a thorough inspection of the premises; that at the time he signed the original offer to buy the property nothing had been said about colored people living in that particular street and there was no occasion for him to investigate to see if negroes lived in the block; that when the second offer was brought to him to sign with a copy of the covenant attached he was told by the agent that some of the houses had been sold to colored people, and that some of the houses were actually occupied by negroes including the house next door, and other white people were going to sell their homes to negroes; that he saw one house in the block occupied by colored people; but that was after he signed the contract by himself and the seller had signed; he admitted he did not consult an attorney about the covenant before he signed the contract, and there was nothing to prevent him from doing so; he admitted he knew the meaning of the covenant when he signed the contract, and that up to the time he rescinded there was no threat made of any kind that the covenant would be enforced; he admitted he rescinded the contract because he did not want a house with a restrictive race covenant on it; that no one contacted him, or in any manner inferred that any action would be taken to enforce the covenant. He stated that before he filed the present suit he had purchased another house.

Thereupon the plaintiff closed his case, and the defendant's counsel moved to dismiss, which motion was overruled.

Thereupon R. G. Dunne testified substantially as follows, on behalf of the defendant: that he was a licensed real estate broker and also a member of the bar of the District Court of the United States for the District of Columbia and that he operates a real estate business at 5th and H Streets,

N. E. That he procured a listing for the sale of the property at 1426 C Street N. E. and advertised it for sale. He further testified that his salesman brought the contract of the plaintiff into the office; that he inserted a clause regarding the covenant in said contract and attached a copy of the covenant thereto, and prepared the assumption of liability in connection with the plaintiff's moving into the property before settlement, and he and the salesman contacted the plaintiff. That he talked to the plaintiff and explained to him that as a matter of record a covenant existed and a copy of which was exhibited to the plaintiff, as attached to the contract; he stated to the plaintiff that the whole neighborhood had changed and was now substantially negro, and the remaining houses which were occupied by white had been listed for sale to colored that the witness felt sure that there would be no attempt to enforce the covenant; that most of the houses were occupied by colored and the others were listed for sale to negroes. That thereupon the plaintiff initialed the contract and signed a copy of the covenant attached together with the liability assumption agreement. The witness testified that there were about 26 houses in this block on both sides of the street; and at least 18 of them were occupied by negroes, and the remainder had their property listed for sale to negroes. He further testified that he had never heard of anyone attempting to enforce the covenant and that the neighborhood had been in this condition for some time.

On cross-examination the witness repeated the above-statements.

Jackson G. Shannon testified that he was a real estate salesman employed by R. G. Dunne and he "sat" on the property involved, when the plaintiff came to inspect; that he informed the plaintiff that the neighborhood was then predominately negro; that the plaintiff executed the contract of purchase and gave him a \$500.00 deposit. He presented the offer and deposit to the office, and Mr. Dunne accompanied him in visiting the purchase, with insertion

in the offer that a copy of the covenant was attached, and a copy of the restrictive covenant was attached to the contract; that he was present when Mr. Dunne explained to the plaintiff that a covenant existed of record and he, Mr. Dunne, wanted the plaintiff to know about it. He heard Mr. Dunne explain that no one had ever hinted that any steps would be taken to enforce the covenant, and due to the fact that the neighborhood was then substantially colored and the remainder of the houses were listed for sale to colored, Mr. Dunne was of the opinion that the covenant was ineffective. The plaintiff initialed the original contract and signed the covenant attached thereto and the letter of assuming liability. Copy of all of these were given to the plaintiff. Mr. Dunne stated to the plaintiff that he, Mr. Dunne, wanted the matter then explained so that no question would be raised later of the existence of this covenant, and that the plaintiff would have to assume the risk. Mr. Dunne stated that the plaintiff made no objection or protest whatever, and seemed perfectly satisfied.

After argument by counsel for the plaintiff and defendant the Court made a finding in favor of the plaintiff. A motion for new trial was overruled and judgment entered in favor for the plaintiff from which the defendant appeal.

(s) ARMOND W. SCOTT,
Trial Judge.

March 31, 1947.

Approved:

(s) PHILIP W. THOMAS,
Attorney for Plaintiff.

(s) HERMAN MILLER,
Attorney for Defendants.

* * * * *

Washington, D. C., August 30, 1946.

Received from Warren F. Baugh (Check), a deposit of Five Hundred Dollars (\$500.00) to be applied as part payment of the purchase of Lot 212 in Square 1054, with improvements thereon known as 1426 C Street, N. E., in the District of Columbia, upon the following terms of sale: (1) Price, Thirteen Thousand Two Hundred Fifty Dollars (\$13,250.00); (2) Purchaser agrees to pay Four Thousand Dollars (\$4,000.00) cash at the date of conveyance, of which sum this deposit shall be a part; (3) The purchaser is to place a first deed of trust and give a second deed of trust secured on the premises of 1426 C Street, N. E., in the amount of Nine Thousand Two Hundred Fifty Dollars (\$9,250.00), bearing interest at the rate of five per cent per annum, on the first trust and six (6) per cent per annum on the second trust, payable in monthly payments of Seventy-five (\$75.00) Dollars, or more, including interest and principal.

.

(5) The property is sold free of encumbrance, except as aforesaid, title is to be good of record, subject, however, to covenants, conditions and restrictions of record, as set forth on the reverse side hereof or attached hereto and made a part hereof; otherwise, the deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be remedied by legal action, but the seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken promptly by and at the seller's expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such action.

(6) Seller agrees to execute and deliver a good and suffi-

cient special warranty deed, and to pay for Federal revenue stamps on the deed.

* * * * *

(13) Within thirty days from the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured if promptly ordered, and/or survey, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof.

* * * * *

(14) The entire deposit shall be held by R. G. Dunne, Agent, until settlement hereunder is made or until the deposit is forfeited. In the event of the forfeiture of the deposit, the Agent shall retain one-half thereof as a compensation for his services and shall pay to the seller the remaining one-half of the forfeited deposit.

* * * * *

This offer is conditioned upon R. G. Dunne, Agent, securing a First Trust loan of at least \$7,000.00, repayable at \$52.50 per month including interest at 5%.

Buyer has full knowledge of covenant on record which is attached hereto and made part of this contract which has been signed by the purchaser.

By (s) R. G. DUNNE, *Agent*.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

August 30, 1946.

(s) WARREN F. BAUGH,
Purchaser

August 30, 1946.

(s) MARK MECKLER,
Seller

Property is to be conveyed in the name of Warren F. Baugh and Mary R. Baugh, as tenants by the entirety.

AGREEMENT

This indenture, made this 27th day of March, 1945, by and between and among the undersigned, all being residents of the District of Columbia, and owners of real estate situate therein; witnesseth that,

WHEREAS, the said parties hereto are all owners of real estate situated in the District of Columbia and located on C Street, between 14th and 15th Streets, N. E., both on the North and the South sides of said street, said property being parts of Squares 1054 and 1055 as recorded in the surveyors office of the District of Columbia; and

WHEREAS, the said parties hereto desire, for their mutual benefit, as well as for the best interest of the said community and neighborhood, to improve in any legitimate way and further the interests of said community and neighborhood;

NOW THEREFORE, in consideration of the premises and the sum of Five Dollars each to the other in hand paid, the parties hereto do hereby mutually agree, promise and covenant, each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more definite description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented or given to negroes or any person or persons of the negro race or blood. This covenant shall run with the land and bind the respective parties hereto, their heirs and assigns, for the period of five years from and after the date of these presents.

Name and seal	Description of Land	
	Lot	Square
Harriet G. Moose.....	141	1054
Nora A. Poteet.....	208	1054
Cassandro E. Clark.....	212	1054
Hugh A. Reamy.....	213	1054
Frank E. & Minnie Nyman.....	90	1055
John H. Snight.....	214	1054
Susan T. Snight.....	214	1054
Frank A. & Lucy Duewerth.....	89	1055
Nellie Harrison.....	143	1054
Leonard Gagliardi.....	211	1054
John C. Cuneo.....	116	1054
Grace E. Barrows.....	142	1054
I. M. Neviasher.....	117	1054
Evelyn Seigel.....	116	1055
Saverio Filipoone.....	119	1054
By Rose F. McQuade under Power of Attorney		
Ernest R. Moose.....	141	1054

(s) WARREN F. BAUGH.

* * * * *

August 30, 1946

Mr. R. G. Dunne
604 H Street, N. E.
Washington, D. C.

Dear Mr. Dunne:

You are hereby authorized to allow Warren F. Baugh to move into 1426 C Street, N. E., upon the condition that prior to his moving in, he will put up the sum of Thirty-Five Hundred Dollars (\$3,500.00) in escrow in the title company searching the title and that settlement, when made

by said title company, will be retroactive to the date of Mr. Baugh's taking possession.

Very truly yours,

(s) MARK MECKLER.

I, Warren F. Baugh, in moving into the premises, 1426 C Street, N. E., hereby certify that I have full knowledge of the existing covenant now in effect covering said 1426 C Street, N. E., and assume full liability in moving in said premises.

(s) WARREN F. BAUGH.

September 11, 1946

Mr. Mark Meckler
1420 New York Avenue, N.W.
Room 220
Washington, D. C.

Dear Sir:

Mr. Warren F. Baugh, 406 Eastern Avenue, N. E., Washington, D. C., has retained our services in connection with a certain contract of sale under date of August 30, 1946, signed by Mr. Baugh as purchaser and yourself as seller of Lot 212 in Square 1054, and otherwise known as premises 1426 "C" Street, N. E., in the District of Columbia.

In this connection it appears that there is a certain covenant of record against said property which said covenant prohibits the sale of said real estate to Negroes or any person or persons of the Negro race or blood; therefore, as a result of the law in this jurisdiction you cannot legally convey said property to Mr. Warren F. Baugh because he is a member of the Negro race.

In view of the foregoing facts, Mr. Baugh hereby repu-

diates and withdraws his signature upon said contract and herewith demands the return of the \$500.00 paid as a deposit on said contract.

Your immediate attention to this matter will be greatly appreciated.

Very truly yours,

PWT/bc

Enc. 1

Cy ltr to

Dunn Realty Co.

September 11, 1946

Mr. R. G. Dunne
604 "H" Street, N.E.
Washington, D. C.

Dear Sir:

This is to advise you that Mr. Warren F. Baugh, 406 Eastern Avenue, N.E., Washington, D. C., has this date advised Mr. Mark Meckler that he has repudiated a certain contract of sale entered into between Mr. Baugh and Mr. Meckler on August 30, 1946, for the alleged purchase of Lot 212 in Square 1054, and otherwise known as premises 1426 "C" Street, N.E., in the District of Columbia.

Mr. Baugh has repudiated said contract because said real estate is encumbered with a covenant which prohibits the sale and conveyance of said land and premises to a Negro, and Mr. Baugh is a member of the Negro race. Under the terms of the contract you, as agent, agreed to hold the deposit of \$500.00 made by Mr. Warren F. Baugh and he hereby demands the return of said \$500.00 forthwith.

Enclosed is a copy of the letter addressed to Mr. Meckler,

which is self-explanatory. Your immediate attention to this matter is requested.

Very truly yours,

PWT/bc

Enc. 1

Cy ltr to

Mr. Mark Meckler

September 13, 1946

Mr. Philip W. Thomas,
207 Florida Avenue N.W.
Washington, D. C.

Dear Mr. Thomas:

Your letter of the 11th, addressed to Mr. Mark Meckler concerning the sale of premises 1426 C Street N.E., to your client Warren F. Baugh, has been turned over to me for reply.

You advise that Mr. Baugh repudiates the contract on account of an alleged covenant of record prohibiting sale to Negroes.

Your request is hereby rejected, and I am requested to advise you that the deposit therein is hereby declared forfeited as provided by the contract because of your client's refusal to consummate said contract, and as reasons therefor you are advised as follows:

First, the contract signed by your client provides "Buyer has full knowledge of covenant of record which is attached hereto and made part of this contract which has been signed by the Purchaser." This clause is likewise initialed by your client. The contract further provides that the property is sold "subject however, to covenants, conditions and restrictions of record." Attached to the contract is a copy of the alleged covenants, and that copy is likewise signed by your

client. Therefore, at the time he had full and completed knowledge and accepted and executed his contract subject to that condition. Secondly, it appears that the covenant probably is no longer in effect due to the change of the neighborhood.

For these reasons you are advised as above, and our position is clearly stated. The Agent is being requested to remit one-half of the deposit to the seller and stated in the contract.

Very truly yours,

(s) HERMAN MILLER.

HM/sec

• • • • • • •

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 502

MARK MECKLER and R. G. DUNNE, APPELLANTS,

v.

WARREN F. BAUGH, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia,
Civil Division.

(Argued May 12, 1947 Decided June 12, 1947)

Herman Miller for appellants.

Philip W. Thomas, with whom *Thomas W. Parks* was
on the brief, for appellee.

Before CAYTON, Chief Judge, and HOOD and CLAGETT, As-
sociate Judges.

CAYTON, *Chief Judge*: This is an appeal by defendants
from a judgment awarding plaintiff the refund of a \$500 de-
posit on the purchase of real estate.

In August 1946, Warren F. Baugh, a person of Negro
blood, signed a contract for the purchase of residential

property at 1426 C Street, Northeast. The owner of the property was Mark Meckler, and his agent in the transaction was R. G. Dunne. A day or two after the contract was signed the agent presented Baugh with a new contract on which was typed this recital: "Buyer has full knowledge of covenant on record which is attached hereto and made part of this contract which has been signed by the purchaser." Attached to the contract was an exact copy of a covenant, dated in March 1945 and recorded the following month, by which eighteen owners of property on both the north and south sides of C Street, Northeast, in the block where the house in question was located, agreed that for a period of five years none of that property would "be used or occupied by, or sold, conveyed, leased, rented or given to Negroes or any person or persons of the Negro race or blood."¹

Plaintiff testified that the agent told him he had brought the new contract form for his signature because the first contract had not mentioned the covenant and the seller wanted him to know about it; that the agent told him the covenant would not be enforced because some of the houses on the block, including the house next door, were already occupied by colored people and that the other owners were also going to sell their homes to Negroes. Plaintiff admitted that he knew the meaning of the covenant before he signed the contract. He also admitted that he initialed the clause reciting that he had full knowledge of the covenant. He also admitted signing a separate agreement by which he would have been permitted to move into the house upon putting up \$3,500 of the purchase price in escrow, and in which he certified "that I have full knowledge of the existing covenant now in effect covering said 1426 C Street, N. E., and assume full liability in moving in said premises." He further testified that though no one had even inferred that any action would be taken to enforce the covenant,

¹ It will be noted that unlike the covenants in some of the cases cited later in this opinion, this one contained no penalty clause.

he had later decided that he did not want a house carrying a restrictive race covenant. He consulted a lawyer who in his behalf notified Meckler, the owner, and Dunne, the agent, that he rescinded the contract and demanded the return of his deposit. Owner and agent rejected the demand and declared the deposit forfeited.

The testimony for defendants concerning the negotiations was practically identical with that of plaintiff. It plainly established that there were on the two sides of the street about twenty-six houses of which at least eighteen were already occupied by colored people; and that all the other owners had listed their property for sale to Negroes. Defendant Dunne also testified that the neighborhood had been in this condition for some time and that he had never heard of anyone attempting to enforce the covenant.

It was upon this evidence that the trial judge made a general finding for plaintiff against the two defendants, the owner and the agent, who are now before this court as appellants. In the evidence, as we have seen, there was no factual dispute on the decisive phases of the case; thus the decision necessarily turned on legal questions. Since the trial judge gave no reasons for his decision we shall examine it and test it by the basic legal principles which govern.

We must start out with the proposition that restrictive race covenants of this kind are valid and not against public policy in this jurisdiction. This has been repeatedly declared by the United States Court of Appeals for the District of Columbia. *Corrigan v. Buckley*, 55 App. D. C. 30, 299 Fed. 899, appeal dismissed 271 U. S. 323; *Torrey v. Wolfes*, 56 App. D. C. 4, 6 F. 2d 702; *Russell v. Wallace*, 58 App. D. C. 357, 30 F. 2d 981, cert. denied 279 U. S. 871; *Cornish v. O'Donoghue*, 58 App. D. C. 359, 30 F. 2d 983, cert. denied 279 U. S. 871; *Grady v. Garland*, 67 App. D. C. 73, 89 F. 2d 817, cert. denied 302 U. S. 694; *Hundley v. Gorewitz*, 77 U. S. App. D. C. 48, 132 F. 2d 23; *Mays v. Burgess*, 79 U. S. App. D. C. 343, 147 F. 2d 869, cert. denied

325 U. S. 868, rehearing denied 325 U. S. 896; *Gospel Spreading Ass'n, Inc. v. Bennetts*, 79 U. S. App. D. C. 352, 147 F. 2d 878. Just a few days ago, while this appeal was pending before us, the United States Court of Appeals again took the same position. *Hurd v. Hodge*, _____ U. S. App. D. C. _____, _____ F. 2d _____, decided May 26, 1947.

Appellee (plaintiff below) acknowledges this. Indeed he fashions from it what we understand to be his principal argument for his right to rescind. He says that race covenants having been so consistently upheld, the contract between these parties to violate the covenant was illegal and void because its purpose was against public policy. This argument we must reject. To hold that race covenants are not contrary to public policy is totally different from saying that it is against public policy for the parties to such a covenant or their successors in interest to abandon it by non-enforcement, or to waive it altogether.² Racial covenants, the United States Court of Appeals has said,³ are like covenants otherwise restricting the use of real property, such as covenants against business uses. Such covenants like other contracts are deemed not contrary to public policy: they are enforceable by proper parties in interest; but no public policy declares that they may not be waived or abandoned. To decide otherwise would perpetuate covenants when the conditions under which they were made have changed or disappeared. In such cases "to enforce the restrictions would be to create an unnatural barrier to civic development and thereby to establish a virtually uninhabitable section of the city."⁴

The rule was laid down in the *Hundley* case and in the *Gospel preading Ass'n* case that when the character of a neighborhood has changed so greatly that enforcement of the

² For a discussion of the general question of waiver of covenants, see *Osius v. Barton*, 109 Fla. 556, 147 So. 862; *Stephl v. Moore*, 94 Fla. 313, 114 So. 455, and cases there cited.

³ *Hundley v. Gorewitz*, *supra*.

⁴ *Hundley v. Gorewitz*, *supra*.

covenant would no longer serve its original purpose, the law regards the covenant as having become ineffective. Here, according to the uncontradicted evidence the increase of colored ownership and residence in the block has been so marked (eighteen out of twenty-six houses being occupied by colored and the remaining eight being listed for sale to colored people)⁵ that the rule in the two cases just cited would inevitably apply.

Here, moreover, the character of the neighborhood changed, not by a slow or gradual process extending over a period of years, nor with mere inaction or acquiescence by the owners. On the contrary, the owners themselves brought the change about by their deliberate, affirmative and seemingly concerted action in opening up the block to colored occupancy. The effect of their action is unmistakable. It amounts to a complete waiver of the covenant.⁶ All the parties to the covenant have combined to kill it; and kill it they have, just as effectively as they could have done by any written and recorded instrument. And yet, dead as the covenant is, we are asked to breathe new life into it, by saying that the parties had no right to waive it. This we decline to do, for it would obviously be against the public interest, and destructive of freedom of contract as well.

It cannot be said that Mr. Baugh, was "buying a law suit," for there is no one left who might conceivably attack his title or his right of possession. And even if such an attempt were made, neither the plaintiff, the trial court, nor this court would have any reason to expect that the "change of neighborhood" rule would not be honored in the courts, especially in view of the waiver we have discussed. We assume that the segregation policy having been repudiated by all the owners, a segregation covenant could not be enforced.

⁵ It should also be remembered that the covenant, by its own terms, now has less than three years to run.

⁶ Compare *Jameson v. Brown*, 71 App. D. C. 254, 109 F. 2d 830. See also *Osius v. Barton* and *Stephl v. Moore*, *supra*.

But tested by an even simpler principle of law, we think plaintiff had no right to recover, under the general circumstances we have recited. Despite the covenant, which he fully understood, he signed the sales contract, initialed thereon his "full knowledge" of the covenant, signed the covenant itself and in a separate writing assumed "full liability" under the covenant in connection with his proposed occupancy of the house. And he has not made even a suggestion of fraud or misrepresentation on the part of the owner or the owner's agent. Thus, even upon his own testimony it is plain that he was a purchaser who with full knowledge of every detail of the situation entered into a valid and binding contract of purchase; and later, for no valid reason, attempted to disavow his contract. Such a purchaser, as we have held in two recent cases,⁷ is not entitled to demand the return of his deposit money.

Reversed.

THURSDAY, JUNE 12, 1947

The Court met pursuant to adjournment. Present: The Honorable Nathan Cayton, Chief Judge, and Andrew M. Hood and Brice Clagett, Associate Judges.

* * * * *

MARK MECKLER and
R. G. DUNNE, *Appellants*,
v.
WARREN F. BAUGH, *Appellee*.

No. 502
October Term, 1946

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on

⁷ *Mitchell v. Cohn*, D. C. Mun. App., 52 A. 2d 631, ____ W. L. R. ____; *Sabghir v. Ginsburg*, D. C. Mun. App., 51 A. 2d 308, 75 W. L. R. 393.

the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court for further proceedings in accordance with the opinion of this Court.

NATHAN CAYTON, *Chief Judge.*
June 12, 1947.

BRIEF IN BEHALF OF APPELLEE

IN THE

**United States Court of Appeals
for the District of Columbia**

OCTOBER TERM 1947

*United States Court of Appeals
for the District of Columbia*

Appeal No. 9573

FILED DEC 10 1947

WARREN F. BAUGH,
Appellant

Joseph W. Starns
CLERK

v.

MARK MECKLER, et al,
Defendant

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

HERMAN MILLER
800 H Street N.W.
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IN THE
**United States Court of Appeals
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OCTOBER TERM 1947

Appeal No. 9573

WARREN F. BAUGH,
Appellant

v.

MARK MECKLER, et al,
Defendant

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In addition to the facts stated by the appellant in his statement of the case, these additional facts may be added: Prior to the execution of the contract, the appellant inspected the premises and the neighborhood. (App. 5 and 7). At the time of the acceptance of the covenant by the appellant, he knew the meaning of covenants, and there were no threats of enforcement. (App. 7). At the time the appellant signed he was advised by the sales broker that some of the

houses in the block had been sold to colored people, and some of the properties were actually occupied by them including the house next door. (App. 7). The reason for requiring the appellant to sign that he was aware of the covenant on the property, and of the letter of his assumption of all liability was to prevent any question of arising concerning the same after the execution of the contract, and to all of which no issue was raised at the time of the signing of the contract. (App. 9). The only reason given by the appellant for rescission was that he began to worry after executing the contract, and consulted an attorney who advised him that he could rescind. (App. 6).

It was also uncontradicted that the sales broker told the appellant that "the whole neighborhood had changed and was now substantially Negro and the remaining houses which were occupied by white had been listed for sale to colored." (App. 8). Further, there were about 26 houses in the block on both sides of the street; and at least 18 of them were occupied by Negroes, and the remainder had been listed for sale to Negroes. (App. 8).

SUMMARY OF ARGUMENT

1. If the contract has the effect of breaching covenants regarding race restrictions, and is void *ab initio*, then there is no need to consider any other question which will avoid the contract because if it is strictly void it requires no other answer.

2. If the contract has the effect of breaking a restrictive covenant existing of record on the property and is void *ab initio*, then the principles announced by this Court in *Hundley v. Gorewitz*, 77 U. S. App. D. C. 48, 132 (2d), 23, and *Gospel Spreading Ass'n v. Bennetts*, 79 U. S. App. D. C. 352, 147 F. (2d) 878, are completely destroyed, and the result is that such covenants would be perpetuated even when conditions under which they were made have changed or disappeared.

3. It is not against public policy to recognize the contract which might violate the covenant even though it has been held that the creation of such covenants are not against public policy.

4. Even if such a covenant exists, the contract may be enforced, and does not lack mutuality, for the same conditions exist in all such cases, and the enforceability of such a covenant is for the benefit of other persons not a party to the contract.

5. When such a covenant exists, the vendor is not entering into a contract, the performance of which is impossible. The contract can be carried out, and the question of enforceability of the covenant must be left to action of the other property owners to be exercised or not as they may elect, and where all of the other property bound thereby is either occupied by the barred race, or listed to be sold to them, there cannot be the slightest question of any impossibility of performance.

ARGUMENT

From the initial statements of the argument of the appellant, he would have it appear that the principal object of the contract was to violate the sanctity of the covenant contract, and the parties knowingly did this with the view to conspire leading to destruction of the covenant. This argument does not take into consideration the additional undisputed and conceded facts surrounding the execution of the contract, to-wit: That the appellant wanted to move into the property prior to settlement; that the neighborhood was now substantially Negro in that of 26 houses in the block 18 of them were occupied by Negroes and the remainder were listed for sale to Negroes. It is clearly apparent that nothing was further from the minds of both of the parties in the execution of the contract. The principal object was to sell a house to the appellant upon which existed, of record, a covenant which the parties had every right to conclude was no longer effective, and in order to

avoid any question about its existence, if it later came up, the appellee required certification by the appellant of his knowledge of its existence.

The arguments of the appellant are not sustained by either his reasoning or by the authorities.

A. The Argument That the Contract Is Void Ab Initio

We concede that this Court has many times held valid restrictive race covenants, starting with the case of *Corrigan v. Buckley*, 55 App. D. C. 30, 299 Fed. 899, *appeal dismissed*, 271 U. S. 323, down to the very recent case of *Hurd v. Hodge*, U. S. App. D. C. — F. (2d) —, decided May 26, 1947. If, as the appellant contends, agreements and contracts which violate such covenants are void *ab initio*, then all other questions regarding their enforceability; the questions of change of neighborhood; the questions of the appellant having full knowledge at the time of his making his contract would never need to be raised, nor considered because if the conclusion were reached that the contract is void *ab initio*, no rights would be established, and the questions of change of neighborhood could never be used in such determinations. Stated another way, if such contracts are void *ab initio*, there never could be a change of neighborhood, nor could there ever be a waiver as presented in *Hundley v. Gorewitz*, 77 U. S. App. D. C. 48, 132 F. (2d) 23, and *Gospel Spreading Ass'n v. Bennetts*, 79 U. S. App. D. C. 352, 147 F. (2d) 878. If the contracts in these last two mentioned cases are void *ab initio*, the questions decided in them should have been disregarded, and no rights conferred upon the purchasers, and no waiver or change of neighborhood excepted for the situation was the same as in the instant case. To hold that once a covenant is created, any subsequent contract or conveyance in violation thereof is void *ab initio*, would perpetuate covenants, regardless of whether the conditions under which they were made had changed or disappeared. It would be impossible to ever abrogate such a covenant, for every conveyance is a contract

between the vendor and vendee of the burdened property, and each of them being void, never could be used to show any change of neighborhood or any waiver. The appellant cites no cases which hold that a contract which violates a covenant is void *ab initio*, but he argues that if the contract establishing such covenants are not against public policy, then any contract which tends to break the covenant is against public policy. From the language of this Court, in those situations where there has been waiver or change of neighborhood, it would appear more reasonable in such cases against public policy to enforce them than to refuse such enforcement because to enforce them "would be to create an unnatural barrier to civic development and thereby to establish a virtually uninhabitable section of the city. *Hundley v. Gorewitz, supra*.

The appellant cites no cases wherein it was held that under similar conditions as prevail in this case that it is against public policy to execute a contract and subsequently a deed to a Negro. To so hold would be to create a rule that once a covenant is created it would thereafter be against public policy to any attempt to make any contract, regardless of the conditions, and change of the neighborhood, and regardless of the agreement of all of the parties whose property is bound thereby to ever attempt to abrogate, waive or cancel it (even though such attempt is made by all of the property owners). Such a rule would itself be against public policy, and would become fantastic.

The cases cited by appellant in his brief of *Reiner v. Newspaper Alliance*, 259 N. Y. 250, 181 N. E. 561; *Roberts v. Criss* 266 F. 296, 11, A. L. R. 698, and *Rhodes v. Malta Vita Food Co.*, 112 N. W. 940, are not on analagous points and are not applicable, having nothing whatever to do with race covenants.

Considering the appellant's two points that the contract is void *ab initio* and secondly the object of the contract is to breach a contract to which other parties have an interest falls, when considered by the principles established by

Hundley v. Gorewitz, supra, and *Gospel Spreading Ass'n v. Bennetts, supra*, for if the appellant is right there never could be a *Hundley* case, nor a *Gospel Spreading Ass'n* case. These two cases decided by this Court definitely establishes in this jurisdiction the principle of waiver and abandonment, and these principles are discussed in *Osius v. Barton*, 109 Fla. 556, 147 So. 862, and *Stephl v. Moore*, 94 Fla. 313, 114 So. 455.

On the last point under this topic, argued by the appellant to the effect that the contract lacks mutuality, the appellant takes a mistaken premise. There is no showing whatever that specific performance would not be granted, and no cases, similar to the facts as exist in this case are cited. It is conceivable that when the copy of the covenant was attached to the contract and the letter signed, the appellees attempted to avoid the very point which occurred, because if these things had not been done it is conceivable that the appellant would take the position that he knew nothing of the covenant and that he was entitled to know of its existence. No matter what the condition of the appellees' minds may have been they could not change the factual conditions surrounding the covenant, and if the appellant, having the full facts before him, and knowing the meaning of covenants elected to accept the property in that condition, without any fraud or misrepresentation, that was the appellant's right, and notwithstanding the language used the appellant could not revive a dead covenant, nor do the facts show that they intended to do so. The appellant desperately picks out words in the contract with the attempt to show that the appellees believed the covenant to be in full force, but by doing so, the appellant fails to give consideration of the other words used by the appellee sales broker outside of the contract when he advised the appellant that of the "whole neighborhood had changed and was now substantially Negro." (App. 8). These statements certainly are inconsistent with any view by the appellee that the covenants were in full force.

B. The Argument That the Contract Was a Nullity Irrespective of the Enforceability of the Covenant

In the first place, this question was not presented in the Trial Court and should not be considered here when presented for the first time.

There was nothing impossible as existed between the appellant and the appellee. The provision regarding the covenant was one for purpose of bringing home knowledge to the appellant, and not inserted as a condition of the sale between them. That obligation not to convey in violation of the covenant was not one which the appellant was given, nor was it intended, under the circumstances, to create an impossibility of performance. Taking the real consideration as the parties intended, it reduced itself to this. The purchaser was contracting for a property on which of record was a restrictive covenant and while the covenant had actually been cancelled by all of the owners of the properties bound thereby by their conveyance to 18 Negroes and the remainder being listed by the owners for sale to Negroes, yet the record showed the covenant, and to avoid any claim that this record had not been made known to the appellant, a copy of the covenant was attached for purpose of notice, and not as a condition. This was all acceptable to the appellant. As between the parties, when the appellant assumed all liability for the covenant, there was no inability on part of the appellee to perform his contract with the appellant, and no impossibility existed as agreed by the parties. The provisions of the contract must be construed in the light of the intent of the parties. By the clear intent and agreement of the parties, and the purpose for which the copy of the covenant was attached, there was no impossibility. The appellee merely had to execute a deed if the appellant complied with the terms of sale, and while the covenant existed of record, actually it had been waived and abrogated under all the circumstances.

D. Argument of Theory of Appellees' Defense

The uncontradicted evidence in the case was that the "whole neighborhood had changed and was now substantially Negro and the remaining houses which were occupied by white had been listed for sale to colored." (App. 8). That there were about 26 houses in the block on both sides of the street and at least 18 were occupied by Negroes, and the remainder was listed for sale to Negroes, it made no difference what the size of the neighborhood might be. When such a predominance existed the rule in *Hundley v. Gorewitz, supra*, is fully applicable. Mr. Dunne, one of the appellees, who himself is a member of the bar, stated the "whole" neighborhood was now colored. The appellant left this statement unchallenged and even did not cross-examine the witness about the facts, but accepted them as being true. To now complain comes too late. It is more appropriate to say, as did the Municipal Court of Appeals stated that the owners themselves brought about the change, not by mere inaction, but by their deliberate, affirmative action in opening up the block to colored occupancy. They all waived the covenant.

E. The Appellant's Knowledge

The appellant makes no attempt whatever to answer the Municipal Court of Appeals' last point to the effect that having full knowledge of the matter and all details of the contract, without any suggestion of fraud, having entered into a valid and binding contract, the reasons given by him do not constitute a valid reason to rescind. If the appellant is correct, then in any covenant case, where the purchaser is given all of the facts, and he assumes full liability for the covenant, by his own whim he decides to disavow, he could get from under his contract, such action would affect the sanctity of contracts and make them cancellable on the wish of the appellants. The Municipal Court of Appeals has established the rule that in such cases the vendee may not seek back his deposit.

CONCLUSION

It is respectfully submitted that the judgment of the Municipal Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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